

AMENDED IN ASSEMBLY APRIL 28, 2005

AMENDED IN ASSEMBLY APRIL 13, 2005

CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

ASSEMBLY BILL

No. 1351

Introduced by Assembly Member Vargas

February 22, 2005

An act to amend Section 11340.5 of, and to add Section 11342.620 to, the Government Code, relating to state agencies, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 1351, as amended, Vargas. Office of Administrative Law: regulations.

Existing law prohibits a state agency from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, unless it has been adopted as a regulation and filed with the Secretary of State. Under existing law, if the Office of Administrative Law is notified, or learns on its own, that an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has not been adopted as a regulation and filed with the Secretary of State, the office may issue a determination as to whether it is a regulation.

This bill would provide that any guideline, criterion, bulletin, *provision in a* manual, instruction, order, standard of general application, or other rule that is a regulation but is not adopted as a regulation and filed with the Secretary of State constitutes an “underground regulation” and would establish a procedure for any interested person with information that a state agency has issued, used,

enforced, or attempted to enforce an underground regulation to petition the Office of Administrative Law for a determination that this agency action is an invalid underground regulation. It would require the office, within ~~15~~ 30 days after receiving a petition, to ~~determine whether the petition raises an issue of considerable public importance requiring prompt resolution~~ *accept or reject the petition* and would make this ~~determination final and decision~~ not subject to judicial review. It also would provide that, if the office ~~determines that a petition raises an issue of considerable public importance requiring prompt resolution~~ *accepts the petition*, then the office is required, ~~within a specified time after public notice and comments~~ *no later than 150 days after public notice of an accepted petition*, to determine whether the agency action is an underground ~~resolution~~ *regulation* and therefore invalid. *It also would suspend these requirements connected with a petition if the agency issuing the alleged underground regulation certifies that it will not issue, use, enforce, or attempt to enforce the regulation.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 11340.5 of the Government Code is
- 2 amended to read:
- 3 11340.5. (a) No state agency shall issue, use, enforce, or
- 4 attempt to enforce any underground regulation as defined in
- 5 Section 11342.620.
- 6 (b) Any interested person with information that a state agency
- 7 has issued, used, enforced, or attempted to enforce an
- 8 underground regulation as defined in Section 11342.620 may
- 9 petition the office for a determination that a particular guideline,
- 10 criterion, bulletin, *provision in a* manual, instruction, order,
- 11 standard of general application, or other rule *or procedure* is an
- 12 underground regulation and, therefore, invalid, and that the state
- 13 agency shall withdraw and cease immediately to use, enforce, or
- 14 attempt to enforce the underground regulation. The petition shall
- 15 include all of the following:
- 16 (1) The name and contact information of the petitioner.

1 (2) The name and contact information of the agency that has
2 allegedly issued, used, enforced, or attempted to enforce an
3 underground regulation.

4 (3) A complete description of the *particular* underground
5 regulation, and a copy of any written expression of the
6 underground regulation.

7 (4) A description of the actions of the ~~state~~ agency evidencing
8 that it has issued, used, enforced, or attempted to enforce the
9 underground regulation.

10 (5) The legal basis for concluding that the guideline, criterion,
11 bulletin, manual, instruction, order, standard of general
12 application, or other rule is a regulation as defined in Section
13 11342.600 and that no ~~exceptions~~ *express statutory exemption* to
14 the requirements of this chapter ~~are~~ *is* applicable.

15 (6) Information demonstrating that the petition raises an issue
16 of considerable public importance requiring prompt resolution.

17 (c) Upon the filing of the petition, the petitioner shall submit a
18 copy of the petition and all attachments to the ~~agency alleged to~~
19 ~~have issued, used, enforced, or attempted to enforce an~~
20 ~~underground regulation.~~ *agency.*

21 ~~(d) (1) Within 15 days after receiving a petition filed pursuant~~
22 ~~to subdivision (b), the office shall determine whether the petition~~
23 ~~raises an issue of considerable public importance requiring~~
24 ~~prompt resolution. If the office determines that the petition fails~~
25 ~~to raise an issue of considerable public importance requiring~~
26 ~~prompt resolution, the office shall issue that determination to the~~
27 ~~petitioner and to the agency alleged to have issued, used,~~
28 ~~enforced, or attempted to enforce an underground regulation. A~~
29 ~~determination by the office that the petition fails to raise an issue~~
30 ~~of considerable public importance requiring prompt resolution is~~
31 ~~final and is not subject to judicial review.~~

32 ~~(2) If the office determines that the petition raises an issue of~~
33 ~~considerable public importance, it shall notify the petitioner and~~
34 ~~the agency alleged to have issued, used, enforced, or attempted to~~
35 ~~enforce an underground regulation of its determination and~~
36 ~~publish the petition or a summary of the petition in the California~~
37 ~~Regulatory Notice Register, giving notice to the public that~~
38 ~~comments on the subject of the petition may be submitted to the~~
39 ~~office within 30 days after publication of the notice. The agency~~
40 ~~alleged to have issued, used, enforced, or attempted to enforce an~~

~~1 underground regulation may submit to the office a response to
2 the petition within 30 days after publication of the notice and
3 shall serve a copy of any response to the petition on the
4 petitioner. The office shall make the comments that it receives
5 available to the petitioner. The petitioner may submit a reply to
6 the agency's response within 15 days after being served with that
7 response.~~

~~8 (3) No later than 45 days after the time for the petitioner to
9 submit a reply to the agency's response, the office shall issue a
10 determination as to whether or not the guideline, criterion,
11 bulletin, manual, instruction, order, standard of general
12 application, or other rule is an underground regulation and,
13 therefore, invalid, and that the agency shall withdraw and cease
14 immediately to use, enforce, or attempt to enforce the
15 underground regulation, setting out the basis for its
16 determination.~~

*17 (d) (1) No later than 30 days after receipt of a complete
18 petition filed pursuant to subdivision (b), the office shall accept
19 or reject the petition, in its entirety or in part, unless, prior to the
20 end of the 30-day period, the agency submits to the office a
21 certification pursuant to subdivision (i). If the office rejects the
22 petition, it shall immediately advise the petitioner and the agency
23 of the rejection and specifically indicate that the rejection
24 reflects no opinion of the office upon the issues raised by the
25 petition. A decision by the office to reject a petition is not subject
26 to judicial review.*

*27 (2) If the office accepts the petition, it shall notify the
28 petitioner and the agency of its acceptance and shall publish the
29 petition or a summary of the petition in the next California
30 Regulatory Notice Register, giving notice to the public that
31 comments on issues raised by the petition may be submitted to
32 the office. Any person submitting comments to the office shall
33 simultaneously provide a copy of the comments to the agency.
34 The agency shall submit to the office a response to the petition
35 and shall serve a copy of any response to the petition on the
36 petitioner. The petitioner may submit a reply to the agency's
37 response to the office and to the agency after being served with
38 that response.*

*39 (3) After the time for the petitioner to submit a reply to the
40 agency's response, and no later than 150 days after publication*

1 *of the accepted petition in the California Regulatory Notice*
 2 *Register, the office shall issue a determination as to whether or*
 3 *not the particular guideline, criterion, provision in a manual,*
 4 *instruction, order, standard of general application, or other rule*
 5 *or procedure is an underground regulation.*

6 (e) Upon issuing a determination pursuant to paragraph (3) of
 7 subdivision (d), the office shall do all of the following:

8 (1) File its determination with the Secretary of State.

9 (2) Make its determination known to the agency, the
 10 Governor, and the Legislature.

11 (3) Publish its determination in the California Regulatory
 12 Notice Register within 15 days of the date of issuance.

13 (4) Make its determination available to the public and the
 14 courts.

15 (f) Any interested person may obtain judicial review of a
 16 determination issued pursuant to paragraph (3) of subdivision (d)
 17 by filing a written petition requesting that the determination of
 18 the office be modified or set aside. A petition shall be filed with
 19 the court within 30 days of the date the determination is
 20 published.

21 (g) A determination issued by the office pursuant to this
 22 section shall not be considered by a court, or by an administrative
 23 agency in an adjudicatory proceeding if all of the following
 24 occurs:

25 (1) The court or administrative agency proceeding involves the
 26 party that sought the determination from the office.

27 (2) The proceeding began prior to the party's request for the
 28 office's determination.

29 (3) At issue in the proceeding is the question of whether the
 30 ~~guideline, criterion, bulletin,~~ *particular guideline, criterion,*
 31 *bulletin, provision in a manual, instruction, order, standard of*
 32 *general application, or other rule that is the legal basis for the*
 33 *adjudicatory action is a regulation as defined in Section*
 34 *11342.600 or an underground regulation as defined in Section*
 35 *11342.620.*

36 (h) *The office shall adopt regulations to implement this*
 37 *section, which shall include regulations specifying the time to file*
 38 *comments on a petition, responses, and replies, and which may*
 39 *include, but not be limited to, the following:*

1 (1) *Authorizing a party who filed comments on a petition to*
2 *submit a reply to the agency's response to the petition.*

3 (2) *Authorizing the office to extend the time for an agency to*
4 *file a response to a petition if the agency is a "state body" as*
5 *defined in Section 11121 and the agency's response requires*
6 *action taken at a meeting subject to Article 9 (commencing with*
7 *Section 11120) of Chapter 1.*

8 (i) *Any action required of the office or an agency by this*
9 *section in connection with a petition shall be suspended if the*
10 *office receives a certification from the agency that it will not*
11 *issue, use, enforce, or attempt to enforce the alleged*
12 *underground regulation along with proof that the certification*
13 *has been served on the petitioner. This certification shall be*
14 *made by the head of the agency or a person with a written*
15 *delegation of authority from the head of the agency in the form*
16 *specified by Section 2015.5 of the Code of Civil Procedure. Upon*
17 *receipt of this certification and proof of service, the office shall*
18 *do all of the following:*

19 (1) *File the petition and the certification with the Secretary of*
20 *State.*

21 (2) *Publish a summary of the petition and the certification in*
22 *the California Regulatory Notice Register.*

23 (3) *If the certification is received after the petition or summary*
24 *of the petition has been published in the California Regulatory*
25 *Notice Register, make the petition and certification known to the*
26 *Governor and the Legislature.*

27 SEC. 2. Section 11342.620 is added to the Government Code,
28 to read:

29 11342.620. "Underground regulation" means any guideline,
30 criterion, bulletin, *provision in a* manual, instruction, order,
31 standard of general application, or other rule that is a regulation
32 as defined in Section 11342.600, but has not been adopted as a
33 regulation and filed with the Secretary of State pursuant to this
34 chapter.